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No. 92-9049

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

Alfred Arthur Sandoval, ***Petitioner,***

v.

State of California, ***Respondent.***

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

RESPONDENT'S BRIEF ON THE MERITS

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*DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
SUSAN LEE FRIERSON
Deputy Attorney General
SHARLENE A. HONNAKA
Deputy Attorney General
DONALD E. DE NICOLA
Deputy Attorney General
SHARON WOODEN RICHARD
Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013
Telephone: (213) 897-2382
Attorneys for Respondent
*Counsel of Record

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QUESTION PRESENTED

Did California's pattern jury instruction on reasonable doubt deprive petitioner of due process and a fair jury trial by inviting his jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. California's Standard Jury Instruction on Reasonable Doubt Comports with the Constitutional Burden of Proof in Criminal Cases	4
A. Introduction	4
B. CALJIC 2.90 is Constitutional	7
1. General analytical approach: The instruction must be viewed in its entirety, not in out-of-context fragments	7
2. CALJIC 2.90 adopts no "plainly" distorting standard of proof	10
a. Moral Certainty	11
b. Moral Evidence	31
c. Not A Mere Possible Doubt	34

II. Any Invalidation of the California Instruction Should Apply Only Prospectively 38

CONCLUSION 46

APPENDIX App. 1 - App. 15

TABLE OF AUTHORITIES

Cases	Page
Addington v. Texas, 441 U.S. 418 (1979)	18, 20
Allman v. State, 571 So. 2d 244 (Miss. 1990)	26
Apodaca v. Oregon, 406 U.S. 404 (1972)	45
Bieghler v. State, 481 N.E.2d 78 (Ind. 1985)	26
Bowen v. State, 715 P.2d 1093 (Okla. Crim. App. 1984)	24
Boyde v. California, 494 U.S. 370 (1990)	7, 17, 18
Bradford v. State, 412 S.E.2d 534 (Ga. 1992)	24
Cage v. Louisiana, 498 U.S. 39 (1990)	6, 10
Canton v. Harris, 489 U.S. 378 (1989)	20
City of Minot v. Rubbelke, 456 N.W.2d 511 (N.D. 1990)	24, 27

Commonwealth v. Banks,
311 A.2d 576 (Pa. 1973) 24, 27

Commonwealth v. Beldotti,
567 N.E.2d 1219 (Mass. 1991) 13

Commonwealth v. Dinkins,
615 N.E.2d 570 (Mass. 1993) 24

Commonwealth v. Webster,
59 Mass. (5 Cush.) 295 (1850) 4

Cool v. United States,
409 U.S. 100 (1972) 30

Cupp v. Naughten,
414 U.S. 141 (1973) 6, 7, 18

Dowling v. United States,
493 U.S. 342 (1990) 6

Egantoff v. State,
208 So. 2d 843 (Fla. App. 1968) 24

Ellis v. State,
356 S.W.2d 426 (Ark. 1962) 24

Estelle v. McGuire,
112 S. Ct. 475 (1991) 6, 7, 9, 12

Ex Parte Adkins,
600 So. 2d 1067 (Ala. 1992) 13, 21

Ex parte McWilliams,
1993 Ala. LEXIS 316 at *29
(Mar. 19, 1993) 23

Gaskins v. McKellar,
111 S.Ct. 2277 (1991) 10, 13

Griffith v. Kentucky,
479 U.S. 314 (1987) 39, 40

Hardin v. State,
355 S.W.2d 105 (Tenn. 1962) 24

Hatheway v. Secretary of Army,
641 F.2d 1376 (9th Cir. 1981) 23

Hicks v. State,
425 S.E.2d 877 (Ga. 1993) 24

Hockenbury v. Commonwealth,
565 S.W.2d 448 (Ky. 1978) 26

Holland v. United States,
348 U.S. 121 (1954) 6, 7, 9, 32

Hopt v. Utah,
120 U.S. 430 (1887) 6, 21, 23, 31, 32

Illinois v. Krull,
480 U.S. 340 (1987) 41, 42

In re Winship,
397 U.S. 358 (1970) 5, 9, 18

Jackson v. Virginia,
443 U.S. 307 (1979) 18, 36

Lanigan v. Maloney,
853 F.2d 40 (1st Cir. 1988) 15, 21-23, 26, 35

Lee v. State,
813 P.2d 1010 (Nev. 1991) 24

Linkletter v. Walker,
381 U.S. 618 (1965) 40

Marshall v. State,
528 S.W.2d 823 (Tenn. Crim. App. 1975) 24

Miles v. United States,
103 U.S. 304 (1881) 23

Monk v. Zelez,
901 F.2d 885 (10th Cir. 1990) 14

Morrissey v. Brewer,
408 U.S. 471 (1972) 42

People of Territory of Guam v. Yang,
800 F.2d 945 (9th Cir. 1986) 24, 26

People v. Brigham,
599 P.2d 100 (Cal. 1979) 21, 38

People v. Hewlett,
519 N.Y.S.2d 555 (App. Div. 1987) 25

People v. Jennings,
807 P.2d 1009 (Cal. 1991) 13, 24

People v. Palumbo,
555 P.2d 521 (Colo. 1976) 26

People v. Rawlins,
569 N.Y.S.2d 635 (App. Div. 1991) 24

People v. Simmons,
95 N.E.2d 477 (Ill. 1950) 26

People v. Turner,
298 N.W.2d 848 (Mich. App. 1980) 24

Perez v. Irwin,
963 F.2d 499 (2d Cir. 1992) 25

Rivett v. State,
578 P.2d 946 (Alaska 1978) 24

Roberts v. State,
620 P.2d 425 (Okla. Crim. App. 1980) 27

State v. Bernal,
330 N.W.2d 219 (Wis. App. 1983) 27

State v. Brewer,
197 N.W.2d 409 (S.D. 1972) 24

State v. Bult,
351 N.W.2d 731 (S.D. 1984) 27

State v. Bush,
569 P.2d 349 (Haw. 1977) 24

State v. Butler,
543 A.2d 270 (Conn. 1988) 26

State v. Cage,
554 So. 2d 39 (La. 1989) 25

State v. Caruolo,
524 A.2d 575 (R.I. 1987) 24

State v. Castrejon,
856 P.2d 616 (Or. 1993) 27

State v. Chavarria,
1993 Ariz. App. LEXIS 165
(Aug. 19, 1993) 37

State v. Donovan,
419 A.2d 1102 (N.H. 1980) 24

State v. Duzan,
1993 Ariz. App. LEXIS 58 at *19
(Apr. 13, 1993) 37

State v. Finnegan,
237 N.W.2d 459 (Iowa 1976) 26

State v. Flores,
566 P.2d 1281 (Wash.App. 1977) 24

State v. Franklin,
163 N.W.2d 437 (Iowa 1968) 24

State v. Harris,
481 P.2d 504 (Ariz. 1971) 27

State v. Johnson,
774 P.2d 1141 (Utah 1989) 27

State v. Lane,
244 A.2d 108 (N.J. 1968) 27

State v. Manning,
409 S.E.2d 372 (S.C. 1991) 25

State v. Morley,
474 N.W.2d 660 (Neb. 1991) 24

State v. Olkon,
299 N.W.2d 89 (Minn. 1980) 26

State v. Pratt,
853 P.2d 827 (Or. 1993) 27

State v. Rhoades,
822 P.2d 960 (Idaho 1991) 13, 24

State v. Schmeig,
322 N.W.2d 759 (Minn. 1982) 26

State v. Seneff,
435 N.E.2d 680 (Ohio App. 1980) 25

State v. Tanzymore,
340 P.2d 178 (Wash. 1959) 27

State v. Udstuen,
345 N.W.2d 766 (Minn. 1984) 26

State v. Varela,
1993 Ariz. App. LEXIS 226 at *20
(Oct. 5, 1993) 37

State v. Watson,
240 S.E.2d 440 (N.C. 1978) 27

State v. Wilkerson,
291 A.2d 8 (N.J. 1972) 24

State v. Wilkins,
523 P.2d 728 (Kan. 1974) 24

State v. Williams,
828 P.2d 1006 (Or. 1992) 13, 25, 37

Stewart v. State,
601 So.2d 491 (Ala. Crim. App. 1992) 24

Stovall v. Denno,
388 U.S. 293 (1967) 40, 42

Sullivan v. Louisiana,
113 S. Ct. 2078 (1993) 12, 43

Taylor v. Kentucky,
436 U.S. 478 (1978) 14, 17

Teague v. Lane,
489 U.S. 288 (1989) 39, 44

United States v. Byrd,
352 F.2d 570 (2d Cir. 1965) 14

United States v. Del Toro Soto,
676 F.2d 13 (1st Cir. 1982) 25

United States v. Drake,
673 F.2d 15 (1st Cir. 1982) 14

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628 F.2d 711 (1st Cir. 1980) 14

United States v. Johnson,
457 U.S. 537 (1982) 40

United States v. Moss,
756 F.2d 329 (4th Cir. 1985) 14

United States v. Peltier,
422 U.S. 531 (1975) 41, 45

United States v. Russell,
971 F.2d 1098 (4th Cir. 1992) 23, 27

United States v. Smaldone,
485 F.2d 1333 (10th Cir. 1973) 23

Walker v. City of New York,
974 F.2d 293 (2d Cir. 1992) 20

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521 So.2d 1290 (Miss. 1988) 26

Williams v. Florida,
399 U.S. 78 (1970) 45

Williams v. United States,
401 U.S. 646 (1971) 45

Wilson v. United States,
232 U.S. 563 (1914) 23

Young v. Anderson,
513 F.2d 969 (10th Cir. 1975) 23

Statutes

Cal. Penal Code § 1096 4

Cal. Penal Code § 1096a 4

Cal. Penal Code § 1259 38

Cal. Penal Code § 1382 39

Other Authorities

CALJIC 1.00 13, 16, 17, 33

CALJIC 1.01 7, 9, 13, 17

CALJIC 2.90 4, 5, 7-11, 13-18, 21, 31-34, 37, 38, 42, 43

CALJIC 8.10 34

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Argument to the Jury, (1993) 28

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STATEMENT OF THE CASE

On October 14, 1984, petitioner shot and killed both Gilbert Martinez and Anthony Aceves during a gang-related fight in Los Angeles. Petitioner also attempted to kill Manuel Torres during the gang fight. Several eyewitnesses saw petitioner kill his unarmed victims. (Rep.'s Tr. 2354-2650.) Petitioner's theory of defense at trial was that he had killed in self-defense. (Rep.'s Tr. 4369-70, 4404.)

Seventeen days later, on October 31, petitioner shot and killed Ray and Marlene Wells in their home, because they had given police information concerning the location of the car petitioner had used on the night of the Martinez and Aceves murders. Petitioner telephoned Benjamin Verduzco after the murders and told him that he had killed the Wellses because they had "snitched" to the police about his car. (Rep.'s Tr. 3264-97.) As to these crimes, petitioner at trial presented an alibi defense. (Rep.'s Tr. 4569, 4958-66, 5031-54.)

A jury convicted petitioner of four counts of first degree murder and one count of attempted murder. (Clerk's Tr. 1495-96, 1608.) The jury also found that petitioner had committed multiple murders, rendering him subject to the death penalty. Cal. Penal Code § 190.2. After the penalty phase of the trial, the jury found death to be the appropriate punishment for petitioner's murder of Marlene Wells, and life imprisonment without possibility of parole to be the appropriate punishment for his murders of Gilbert Martinez, Anthony Aceves, and Raymond Wells. (Clerk's Tr. 1733.)

The California Supreme Court affirmed the judgment and penalty in its entirety.

SUMMARY OF ARGUMENT

In California, state statutes set forth the prosecution's burden of proving a criminal defendant guilty beyond a reasonable doubt, define "reasonable doubt," and specifically allow state courts to instruct on reasonable doubt in the statutory language. In accord with the statutes, the standardized set of pattern jury instructions, almost invariably employed in California criminal trials, includes an instruction on reasonable doubt in that same statutory language.

Petitioner Sandoval, relying primarily upon this Court's decision in *Cage v. Louisiana,* 498 U.S. 39 (1990), now claims that this standardized jury instruction on reasonable doubt deprived him of the fair trial guaranteed by the Due Process Clause. To prevail in this claim, however, he must show a *reasonable likelihood* that his jury interpreted the instruction in a way that lightened the prosecution's burden of proving guilt beyond a reasonable doubt. *Estelle v. McGuire*, 112 S. Ct. 475, 482 & n.4 (1991).

California's reasonable doubt instruction differs dramatically from the one this Court held unconstitutional in *Cage.* The infirm instruction in *Cage* directly redefined "reasonable doubt" -- as "actual substantial doubt," and "grave uncertainty" -- in ways that plainly increased the level of doubt that should trigger an acquittal. *Cage*, 498 U.S. at 41. The California instruction, in contrast, nowhere re-quantifies the degree of acquittal-triggering doubt in any way that "plainly" suggests a higher degree of doubt than simple "reasonable" doubt.

The California instruction's references to the terms "moral evidence," "moral certainty," and "mere possible

doubt," the main targets of petitioner's criticisms, do not operate in a way that makes it reasonably likely a juror would apply an erroneous standard for "proof beyond a reasonable doubt." The instruction first merely acknowledges the truism that the prosecution, engaged in an enterprise that always must admit the potential effect of human fallibility, is not required to prove the defendant's guilt to an absolute certainty beyond all possible or imaginary doubt. Then it emphasizes the solemnity of the juror's decision to find a criminal defendant guilty and the heightened degree of subjective certainty required to sustain a verdict of guilt. In doing so, the instruction promotes -- and, more important, does not undermine -- the constitutional goal of "'impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" *In re Winship,* 397 U.S. 358, 364 (1970).

Petitioner's own criticism of these terms is a failure. He improperly removes and isolates words and phrases out of their proper context in the instructions. And he implausibly ascribes to them meanings inconsistent with their contextual meanings. Finally, petitioner ignores other standard instructions that render the risks he discerns in the reasonable-doubt instruction especially improbable.

Even if this Court were to hold the California instruction unconstitutional, such a holding should apply prospectively only. This Court should recognize, given the uniqueness of this case, an exception to the normal rule of retroactivity in non-final cases. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

ARGUMENT

I. California's Standard Jury Instruction on Reasonable Doubt Comports with the Constitutional Burden of Proof in Criminal Cases.

A. Introduction.

Since 1927 in California, state statutes (a) have set forth the prosecution's burden of proving a criminal defendant guilty beyond a reasonable doubt, (b) have amplified the concept of "reasonable doubt," and (c) specifically have allowed state courts to instruct on reasonable doubt in the statutory language. Cal. Penal Code §§ 1096, 1096a. The statutory description of reasonable doubt finds its roots in a well-known 1850 case decided by the Supreme Judicial Court of Massachusetts. *Commonwealth v. Webster,* 59 Mass. (5 Cush.) 295, 320 (1850). In accord with the statutes, the standardized set of pattern jury instructions almost invariably employed in California criminal trials includes an instruction, CALJIC 2.90,[1/] that describes reasonable doubt in that same statutory language.

The judge in petitioner's trial, therefore, instructed the jury about the prosecution's burden of proving guilt beyond a reasonable doubt in the language of CALJIC 2.90:

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1. The Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County, California, *California Jury Instructions Criminal,* (Phillip H. Richards ed., 4th ed. 1979) (hereinafter CALJIC). Where excerpts of CALJIC instructions are quoted in this brief with portions italicized, the emphasis has been added by respondent.

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(J.A. 49.)

This instruction states correctly that the prosecution bears the burden of proving the defendant guilty "beyond a reasonable doubt." *In re Winship,* 397 U.S. 358, 364 (1970). In fact, it employs the phrase "reasonable doubt" three separate times. And other standard instructions, given to the jury in petitioner's case, repeat that standard many more times. (J.A. 49-50, 56-57, 63.)

Petitioner never objected to CALJIC 2.90 at trial or sought modification of it. That is not surprising, given the benefits to the defense that *trial lawyers* discern in the instruction. *See infra* pp. 26-31. Perhaps recognizing those benefits, petitioner's trial lawyer repeatedly employed the challenged language of the instruction in his arguments to the jury. (J.A. 79, 84-86; *see infra* note 9.) It was not until the supplemental briefing stage of the state appeal -- two years after this Court's decision

in *Cage v. Louisiana,* 498 U.S. 39 (1990) (per curiam) – that petitioner voiced any dissatisfaction with this traditional instruction.

Nevertheless, petitioner now claims that this standardized jury instruction on reasonable doubt, notwithstanding its roots in tradition, deprived him of the fundamentally fair trial guaranteed by the Due Process Clause. Indeed, he does so notwithstanding his concession that, at least until some point in the past, "the crucial" challenged portions of the instruction carried meaning "consistent with the then-existing *and* with today's understanding of proof beyond a reasonable doubt." (Pet'r's Br. 5; *see id.* 34.)

This Court, however, has "'defined the category of infractions that violate "fundamental fairness" very narrowly.'" *Dowling v. United States,* 493 U.S. 342, 352 (1990). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Id.* Because this Court remains mindful of these restrictions in reviewing claims of unconstitutional jury instructions, *Estelle v. McGuire,* 112 S. Ct. 475, 482 (1991), petitioner's success in this case requires him to meet a heavy burden. It would not be enough for him to show that the challenged instruction is unhelpful or subject to valid criticism, *see Hopt v. Utah,* 120 U.S. 430, 440-41 (1887), or that it is confusing on the reasonable-doubt standard, *see Holland v. United States,* 348 U.S. 121, 140 (1954), or that it is undesirable or disfavored, or even that it is universally condemned, *Cupp v. Naughten,* 414 U.S. 141, 146 (1973). Instead, he must show a *reasonable likelihood* that his jury interpreted the instruction in a way that lightened the prosecution's

burden of proving guilt beyond a reasonable doubt. *McGuire,* 112 S. Ct. at 482 & n.4; *see Holland,* 348 U.S. at 140.

B. CALJIC 2.90 is Constitutional.

1. General analytical approach: The instruction must be viewed in its entirety, not in out-of-context fragments.

As the focus of an attack intended to demonstrate a reasonable likelihood that his jury misinterpreted the instruction to dilute the standard of proof, petitioner cites the references in CALJIC 2.90 to "moral evidence" and "moral certainty," and the reference to reasonable doubt as something other than "mere possible" or "imaginary" doubt. His critique, however, is misplaced in a constitutional analysis. Instead of trying to demonstrate unconstitutionality in the meaning imparted by the entirety of the instruction, with all of the challenged language viewed in full context, *see Boyde v. California,* 494 U.S. 370, 380-81 (1990); *Naughten,* 414 U.S. at 146-47, petitioner concentrates myopically on individual words divorced from phrases and on abstract phrases divorced from the relevant sentences.

Petitioner's jury was instructed "not to single out any certain sentence or any individual point or instruction and ignore the others," but instead to consider "all the instructions as a whole and . . . to regard each in light of all the others." CALJIC 1.01; J.A. 39. Yet petitioner stubbornly proceeds to dissect a trio of phrases -- "moral evidence," "moral certainty," and "some possible or imaginary doubt" -- in sterile isolation. He concludes from this lifeless autopsy that these three phrases invite

the jurors (1) to rely on extra-evidentiary sources, (2) to render a mere moral judgment about the defendant and his conduct, and (3) to do so under a watered-down standard of proof prohibiting acquittal unless innocence appears "probable." But he never deals with the phrases in the context of the entire active instruction -- the organic whole -- and it is the entire functioning instruction rather than mere disembodied components of it that petitioner must try to defeat in this case.

In the actual instruction, these phrases operate to convey ideas quite different from those petitioner ascribes to them in abstract isolation. After informing the jury of the presumption of the defendant's innocence, CALJIC 2.90 functions as a whole to state the prosecution's burden of proof as "beyond a reasonable doubt," to impart some helpful but non-controversial observations about reasonable doubt, and to emphasize the high level of subjective certainty required to overcome reasonable doubt. Viewed in full context, the instruction virtually self-defines "moral evidence," not as having anything to do with the defendant's or the jurors' morality, but as the potentially fallible kind of courtroom evidence with which jurors unavoidably must reckon in determining which retrospective version of the events at issue is true. And, by distinguishing reasonable doubt from "mere possible" or "imaginary" doubt, the instruction in no way implies that a defendant's innocence must be probable in order to require acquittal. The instruction merely signals that not every imaginable doubt jurors might conjure will necessarily amount to a reasonable doubt.

The California instruction then emphasizes the high standard of proof in criminal cases by likening reasonable doubt to "that state of the case which, after

the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." The instruction therefore endorses no source for the jury's verdict other than "the case" and "the evidence"; and, indeed, a separate standard instruction requires the jury to determine the facts "from the evidence" and "not from any other source." CALJIC 1.01; J.A. 38. It poses no question of the defendant's morality to be resolved, but only the question of "the truth of the charge." And it provides no standard of proof other than "beyond a reasonable doubt." In fact, "reasonable doubt" appears as the standard three times in the challenged instruction and numerous other times in the surrounding instructions, so it is not likely the jurors were unmindful of it as the core concept guiding their deliberations.

A proper analysis of the California instruction in its entirety and in context with other instructions -- rather than when broken apart into unrecognizable fragments -- will show that the instruction comports with the Constitution's goal of assuring that jurors reach a "subjective state of certitude" that guilt has been proved beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970). Even more to the point, proper analysis of the instruction will refute petitioner's claim that there is a "reasonable likelihood" the jurors in his case interpreted CALJIC 2.90 to dilute the constitutional standard of proof applicable to criminal cases. *McGuire,* 112 S. Ct. at 482 & n.4; *Holland,* 348 U.S. at 140.

2. CALJIC 2.90 adopts no "plainly" distorting standard of proof.

Petitioner's constitutional attack on CALJIC 2.90 relies for its foundation upon this Court's opinion in *Cage v. Louisiana,* 498 U.S. 39 (1990) (per curiam). There, this Court struck down Louisiana's reasonable doubt instruction as unconstitutional. California's reasonable doubt instruction, however, differs dramatically from the one invalidated in *Cage.*

Most important, the California instruction avoids the serious error of employing terms that are themselves dangerous and distorting as direct analogues or equivalents of "reasonable doubt." The Louisiana instruction fell into that mistake, for it allowed the particularly dangerous terms "substantial doubt" and "grave uncertainty" to operate as direct substitutes for "reasonable doubt." This Court's condemnation of those descriptions was crucial to its decision in *Cage:* "[i]t is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U.S. at 41. The California instruction, in contrast, does not distort the definition of reasonable doubt by defining it as "actual substantial doubt," or "grave uncertainty," or as any other similar kind of doubt. Indeed, the California instruction does not even depart from the traditional expression of the core concept of "reasonable doubt" as "doubt" that is anything other than "reasonable." The plainly dangerous choice of the terms "substantial" and "grave" in the Louisiana instruction, and the absence of any such terminology in CALJIC 2.90, fundamentally distinguishes this case from *Cage. See Gaskins v. McKellar,* 111 S. Ct.

2277, 2277 (1991) (Stevens, J., concurring) (order denying petition for certiorari).

Petitioner, of course, claims to detect similar dangerous distortion in the phrases "moral certainty," "moral evidence," and "not a mere possible doubt" found in CALJIC 2.90. But he cannot substantiate his assertions. He acknowledges that, at least up to some point in the past, California's instruction and its use of these terms comported fully with the standard of proof beyond a reasonable doubt. (Pet'r's Br. 5.) His argument that the isolated phrases have undergone some gradual transformation in the meantime, however, is generally beside the point. Instead, when those phrases are used even today in the context of CALJIC 2.90, the entire instruction continues to pass constitutional muster.

a. Moral Certainty.

1. Moral Certainty and Evidentiary Certainty: The reference to "moral certainty" in CALJIC 2.90 does not suggest that the jurors are to determine guilt upon any basis other than the evidence in the case.

It is true, of course, that this Court in *Cage* questioned the Louisiana instruction's statement -- that "'[w]hat is required is not an absolute or mathematical certainty, but a moral certainty'" -- and pointed out that the statement referred to "moral certainty" rather than to "evidentiary certainty." 498 U.S. at 40-41. But, as noted above, the gravamen of the *Cage* holding was the distorting effect worked by the "actual substantial doubt" and "grave uncertainty" language. To the extent this Court questioned the "moral certainty" language in *Cage,*

it did so in light of the obvious deleterious impact the other condemned reformulations of reasonable doubt exerted on it.

> The charge . . . equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. *When those statements are then considered with the reference to "moral certainty,"* rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted [2/] the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

498 U.S. at 41 (emphasis added). California's instruction, as noted above, does not repeat those erroneous formulations of reasonable doubt as "grave uncertainty" and "actual substantial doubt." The absence

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2. Since the decision in *Cage*, this Court has expressly disapproved the standard of review for jury instructions used in *Cage* and determined that the proper constitutional inquiry is whether there is a "reasonable likelihood" the defendant's jury has misinterpreted the instruction in a way incompatible with the Constitution, rather than whether a reasonable juror "could have interpreted" the instruction in the constitutionally condemned way. *McGuire*, 112 S.Ct. at 482 n.4. Given this new standard of review, it is an open question whether even the Louisiana instruction at issue in *Cage*, or an instruction equivalent to it, still would be deemed unconstitutional today. *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081 n.1 (1993).

of those other condemned descriptions of reasonable doubt brings the California instruction, notwithstanding its employment of the term "moral certainty," outside the ambit of *Cage's* condemnation of the Louisiana instruction as unconstitutional. *See Ex Parte Adkins*, 600 So. 2d 1067, 1071 (Ala. 1992); *People v. Jennings*, 807 P.2d 1009, 1041-42 (Cal. 1991); *State v. Rhoades*, 822 P.2d 960, 979-80 (Idaho 1991); *Commonwealth v. Beldotti*, 567 N.E.2d 1219, 1225 (Mass. 1991); *State v. Williams*, 828 P.2d 1006, 1020-21 (Or. 1992); *see also Gaskins v. McKellar*, 111 S.Ct. 2277, 2277 (1991) (Stevens, J., concurring) (order denying petition for certiorari).

In addition, the phrase "moral certainty" in the California instruction, unlike in the Louisiana charge, is explicitly linked to the jurors' evaluation of the evidence in the case. Reasonable doubt thus is equated in CALJIC 2.90 with "that state of *the case* which, after *the entire comparison and consideration of all the evidence*, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of *the truth of the charge*." A second standard California instruction, which the jury in petitioner's trial was told to regard "in light of all the others," expressly confirmed that the jury was to "determine the facts of the case *from the evidence received in the trial and not from any other source*." CALJIC 1.00, 1.01; J.A. 38, 39. The reference to "moral certainty" rather than to "evidentiary certainty" in the California instruction, then, does not pose a risk comparable to that in the Louisiana instruction.

Respondent acknowledges that some courts have criticized use of the term "moral certainty" in similar contexts on grounds, for example, that the phrase has been subjected to "mixed reviews" and "could be

interpreted to mean that the certainty is based on feeling, *i.e.,* moral conviction, rather than facts." Those views were expressed in the First Circuit opinion in *United States v. Indorato,* 628 F.2d 711, 721 & n.8 (1st Cir. 1980), an opinion cited by this Court in *Cage.*[3/] But mere "mixed reviews" and mere possible misinterpretations do not establish the unconstitutional "reasonable likelihood" that petitioner's jury misapplied the instructions in his case in a way that diminished the prosecution's burden of proof. Even in *Indorato* the court found no "legal or constitutional error." 628 F.2d at 721.

Moreover, in *United States v. Drake,* 673 F.2d 15, 21 n.6 (1st Cir. 1982), the same Circuit tempered its criticism of the "moral certainty" language. *Drake* noted the term was "less objectionable" (1) when it is phrased, as it is in CALJIC 2.90, as a "negative" description of the inability of jurors to attain certainty, rather than in a

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3. The other cases cited by this Court in *Cage* lend petitioner scant support in his attack on California's instruction. In *Monk v. Zelez,* 901 F.2d 885, 889-90 (10th Cir. 1990), the appellate court concluded, not that "moral certainty" language was objectionable, but only that it was not enough to cure other errors in the instruction at issue. On the validity of the "moral certainty" language itself, the court characterized it as the strongest language in the charge that might have served to correct the diluting effect of the other errors. *United States v. Moss,* 756 F.2d 329, 333 (4th Cir. 1985), took the position that judges should not try to define reasonable doubt to the jury. In *United States v. Byrd,* 352 F.2d 570, 575 (2d Cir. 1965), the jury was instructed that it could acquit only if they harbored a "doubt to a moral certainty." That is the opposite of the California instruction. In *Taylor v. Kentucky,* 436 U.S. 478, 488 (1978), this Court criticized, not "moral certainty" language, but an instruction that referred to reasonable doubt as "substantial" and "real," and that did so in the absence of any presumption-of-innocence instruction.

"positive" way as a direct definition of "proof beyond a reasonable doubt" and (2) when the context makes clear, like it also does in CALJIC 2.90, that the jury must make its decision "after careful and impartial consideration *of the evidence.*" *Id.* at 20, 21 n.6.

Finally, a later First Circuit opinion in *Lanigan v. Maloney,* 853 F.2d 40, 43 (1st Cir. 1988) applauded the Massachusetts *Webster* instruction, the model for California's, finding it "hard . . . to imagine a charge more reflective of the solemn and rigorous standard intended." *Lanigan,* indeed, criticized an attempted *departure* from the "moral certainty" language that watered the phrase down to reflect only "*a degree of* moral certainty." Unlike the phrase "moral certainty" itself, *Lanigan* recognized, the departure from the phrase "failed to convey the critical point that, while absolute certainty is unnecessary, a belief in guilt at least approaching certainty was required." 853 F.2d at 47 & n.4 (emphasis in original). Although acknowledging the Circuit's prior criticisms of the unadorned phrase "moral certainty," *Lanigan* noted that the instruction there at issue -- like the one at issue in this case -- linked the phrase "with other terms emphasizing the high degree of proof needed." *Id.,* at n. 4. Thus, as in this case, the instruction in *Lanigan* referred not merely to moral certainty, but to "an abiding conviction to a moral certainty." *Id.*

Petitioner cites dictionary definitions and examples of contemporary usage of "moral certainty" in newspapers and magazines to try to show that, as used nowadays, the phrase commonly conveys the strength of beliefs founded upon sources other than empirical evidence. (Pet'r's Br. 25-30.) The pertinent question for this source-of-certainty argument, however, is not what a dictionary

might say "moral certainty" means in the abstract and in isolation. Nor is the question what people mean by "moral certainty" when they use the phrase in informal situations where their certitude happens not to be based upon a formal courtroom evidentiary demonstration.

The real question is what jurors in a criminal case would understand by an instruction setting out the prosecution's burden of proof as "beyond a reasonable doubt" and offering them a way of thinking about proof beyond a reasonable doubt in the language of CALJIC 2.90. Phrased in the way most relevant to this appeal, the crucial question is, again, whether it is reasonably likely that petitioner's jury -- despite being instructed specifically of the necessity of having an abiding conviction to a moral certainty of "the truth of the charge" after full consideration of "all the evidence" -- nevertheless felt authorized somehow to base their factual conclusions on anything but the factual evidence adduced at trial.

Petitioner's dictionary and usage examples do not materially aid in answering that question. They in no way suggest that the phrase "moral certainty" becomes incomprehensible when explicitly premised upon a foundation of objective evidence. One who is morally certain that heroin use among children is bad, or that cannibalism is wrong, logically and naturally may also be equally "morally certain" about the existence of certain facts. The California instruction asks jurors to be certain of evidentiary facts in that way, *i.e.*, to have an abiding conviction to a moral certainty of the truth of the charges *based upon all the evidence at trial.*

Even if CALJIC 2.90 by itself risked the unlikely misinterpretations suggested by petitioner, that would not be the end of the inquiry. Instead, a challenged

instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole. *Boyde v. California,* 494 U.S. 370, 380-81 (1990). In this case, the jury received other standard instructions, besides the reasonable-doubt charge contained in CALJIC 2.90, that further insured against the risk of extra-evidentiary verdicts that petitioner perceives. As already noted, petitioner's jury was specifically instructed "to determine the facts of the case *from the evidence received in the trial and not from any other source.*" CALJIC 1.00; J.A. 38. Further, the jury was instructed to accord the defendant a presumption of innocence. CALJIC 2.90; J.A. 49. As this Court recognized in *Taylor v. Kentucky,* 436 U.S. 478, 485-86 (1978), the "purging" effect of such an instruction helps safeguard the accused's right to be judged solely on the evidence at trial. In addition, the jury was instructed not to be influenced by "pity" or "prejudice," or by "sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." CALJIC 1.00; J.A. 39. And they were told to consider all these instructions "as a whole and . . . to regard each in the light of all the others." CALJIC 1.01; J.A. 39.

2. *Moral Certainty as a Level of Certainty: The use of moral certainty in the instruction does not diminish the standard of proof beyond a reasonable doubt.*

Petitioner also makes the unusual claim that CALJIC 2.90's reference to "moral certainty" is invalid because it diminishes the high degree of certainty required to convict under the beyond-a-reasonable-doubt standard. (Pet'r's Br. 17-21.) Again, in pressing this attack,

petitioner seeks to treat the phrase "moral certainty" in isolation, divorced from its context in the challenged California instruction. And, again, he cannot be allowed to do so. *Boyde*, 494 U.S. at 380-81; *Naughten*, 414 U.S. at 146-47. CALJIC 2.90 provides the context:

> Reasonable doubt is defined as follows: It is not a mere possible doubt . . . . *It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in the condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.*

This instruction is fully consonant with the policy that underlies the reasonable doubt rule itself. As reflected in the holding of this Court in *In re Winship*, 397 U.S. 358 (1970), which first recognized the constitutional status of the beyond-a-reasonable-doubt standard, proof of criminal convictions requires a standard that "'impresses on the trier of fact the necessity of reaching a *subjective state of certitude of the facts in issue.*'" *Id.* at 364 (emphasis added). Such a standard must surpass any lesser standard that is "'susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to *its effect in convincing his mind of the truth of the proposition asserted.*'" *Id.* at 367-68 (emphasis added); *see Addington v. Texas*, 441 U.S. 418, 423 (1979) (the function of standards of proof under the Due Process Clause is to instruct the factfinder concerning *the degree of confidence our society thinks he should have* in the correctness of his factual conclusions); *see also Jackson v. Virginia*, 443 U.S. 307, 330 (1979) (Stevens, J., concurring) (reasonable

doubt standard sets burden of proof "regarding the *subjective state of mind* that persons charged with the responsibility of evaluating the credibility of evidence must possess before they find the defendant guilty . . . .") (emphasis added). The California instruction emphasizes the solemnity of the juror's decision to find a criminal defendant guilty and the especially high degree of subjective certainty required to sustain a verdict of guilt.

It is hard to imagine, first, how any instruction requiring a criminal conviction to be founded only upon the jurors' "certainty" -- regardless of what kind of category of certainty -- can plausibly be said to ease the prosecution's burden of proving guilt beyond "reasonable doubt." The word "certainty," unaccompanied by any quantifying adjective that might work to minimize the required level of certainty, can hardly present an unacceptable likelihood that jurors will not only misunderstand it but misunderstand it in a way that reduces the prosecution's burden.

Nor is there anything in the phrase "moral certainty" that would suggest a reduction, rather than an intensification, of the certainty requisite under the instruction or of the prosecution's duty to prove guilt beyond reasonable doubt. One who is morally certain of the "truth of the charge" is not *less* certain of it than one who is simply described as certain. The word "moral" in this context does not operate to minimize any level of certainty. Quite differently, it describes an especially strong kind of subjective certainty that reflects a deeply important personal decision. It emphasizes the solemnity of the decision a juror makes when he determines a defendant's criminal culpability. In doing this, the instruction serves the purpose of the reasonable doubt rule and does not detract from it.

This Court itself recently used the very phrase "moral certainty," in a commonsense and natural way that illustrates the extraordinarily high degree of certainty use of the phrase conveys. In *Canton v. Harris,* 489 U.S. 378, 390 n.10 (1989), this Court stated: "[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons." *See also Walker v. City of New York,* 974 F.2d 293, 297, 300 (2d Cir. 1992) (district attorneys know to a "moral certainty" that their trial prosecutors sometimes will find themselves in possession of exculpatory *Brady* evidence). No criminal defense lawyer would object to an instruction that the prosecution was bound to prove guilt to an elevated degree of certainty comparable to that ascribed to the city policymakers in *Harris.* As reflected in this Court's own use of the phrase in that case, moral certainty connotes the highest degree of certainty.

Petitioner, as noted above, cites dictionary definitions[4] and examples of contemporary usage of the phrase "moral certainty" from newspapers and magazines. (Pet'r's Br. 25-30.) Through these citations, of course, he means to support his separate assertion that people

4. One cannot rely purely on dictionaries, of course, to provide definitive statements of the meanings jurors ascribe to words and phrases employed in jury instructions. "Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among [various standards of proof] or the nuances of a judge's instructions on the law may well be largely an academic exercise . . . ." *Addington v. Texas,* 441 U.S. 418, 424 (1979). But it is nevertheless noteworthy that "moral" and "moral certainty" have been defined in dictionaries as indicating heightened rather than diminished certainty. "Moral certainty" itself has been defined as "probability so great that no reasonable doubt is possible." Oxford American Dictionary 432 (1980 ed.). (Pet'r's Br. 25 n. 18.)

often use the phrase to convey beliefs founded on sources other than empirical evidence. *See supra* p. 15. But the striking, albeit unintended, effect of petitioner's citations, in the context of this novel level-of-certainty argument, is to confirm that people commonly use the phrase "moral certainty" to denote their thorough and utter conviction that a given proposition is true. Still less do those citations imply that people would interpret "moral certainty" as suggesting an inferior level of certainty when they are asked to achieve "an abiding conviction, to a moral certainty," before returning a verdict of criminal guilt in solemn judicial proceedings.

In any event, petitioner's fixation on the isolated phrase "moral certainty" ignores the larger picture. The California instruction requires something more than the "moral certainty" treated in isolation by petitioner. CALJIC 2.90 affords the jurors guidance on reasonable doubt by likening it to an inability to attain "an *abiding conviction,* to a moral certainty, *of the truth of the charge.*" "Abiding" means "settled and fixed," *Hopt v. Utah,* 120 U.S. at 439, and "strongly" and "deeply" held, *People v. Brigham,* 599 P.2d 100, 104 (Cal. 1979). And surely there is nothing in the word "conviction" that connotes anything but the highest degree of certainty. "Abiding conviction" language thus helps assure that, by emphasizing the high degree of the juror's conviction and certainty in "the truth of the charge," the instruction is conforming with the policy behind the reasonable-doubt rule rather than undermining it. *Lanigan v. Maloney,* 853 F.2d 40, 43, 47 n. 4 (1st Cir. 1988); *Ex parte Adkins,* 600 So. 2d 1067, 1071 (Ala. 1992).

Not even petitioner claims that "abiding conviction" language tends to suggest a standard incompatible with the constitutional one. Even he grudgingly acknowledges

that phrase at least informs the jurors they must be "very sure." (Pet'r's Br. 17.) So, instead, he tries to avoid the phrase's pro-defense effect by reading it out of the text of the instruction entirely. In petitioner's strange view of the text, "'abiding conviction' does not have any independent effect in conveying the standard of proof. [I]t simply indicates that the trier of fact must be very sure that the standard of proof, otherwise defined [as moral certainty], has been met." (Pet'r's Br. 17.) But it is useless for petitioner to deny the literal wording and structure of the instruction. The instruction explicitly equates the absence of reasonable doubt, not just with "moral certainty," but with "an abiding conviction, to a moral certainty, of the truth of the charge" based on all the evidence. The instruction does not simply require, as petitioner says, that the jurors be "very sure" that some variable standard of proof has been met. It requires them to be deeply and lastingly sure (abiding conviction) of the "truth of the charge," and requires that this "conviction" itself attain the highest level of certitude (moral certainty). The linking of "abiding conviction" and "moral certainty" properly emphasizes the high degree of proof needed to convict. *Lanigan*, 853 F.2d at 47 n.4. It implies that the determination of proof beyond a reasonable doubt requires an intensified and heightened degree of subjective certainty. The California reasonable doubt instruction is in accord with the mandate of *Winship*, for it reflects the need for subjective certainty.

Outside the particular context of the Louisiana instruction disapproved in *Cage*, this Court has upheld, against a claim that it erroneously defined reasonable doubt, an instruction containing the statement that "'[p]roof beyond a reasonable doubt is such as will

produce *an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist,* so that you feel certain that it exists.'" *Miles v. United States,* 103 U.S. 304, 309, 312 (1881) (emphasis added); *see also Wilson v. United States,* 232 U.S. 563, 570 (1914). The similarity with the California instruction in this regard -- "an abiding conviction, to a moral certainty, of the truth of the charge" -- is obvious.[5]

And, in the modern era, many courts continue to approve the use of "moral certainty" in jury instructions as descriptive of the subjective state of mind requisite to a jury determination of the defendant's guilt "beyond a reasonable doubt." Federal courts have done so. *E.g., Lanigan v. Maloney,* 853 F.2d at 47 n.4 (1st Cir.); *Hatheway v. Secretary of Army,* 641 F.2d 1376, 1384 (9th Cir. 1981); *Young v. Anderson,* 513 F.2d 969, 972 (10th Cir. 1975); *United States v. Smaldone,* 485 F.2d 1333, 1348 (10th Cir. 1973); *see also United States v. Russell,* 971 F.2d 1098, 1109 (4th Cir. 1992) (suggesting "moral certainty" is either redundant or implies a level of proof even greater than beyond a reasonable doubt). And state courts in California and at least seventeen other jurisdictions elsewhere have done so. *E.g., Ex parte*

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5. This Court in *Hopt v. Utah,* 120 U.S. at 440, indicated that equating "beyond a reasonable doubt" with "reasonable and moral certainty" was redundant. California's language is, of course, quite different, particularly in avoiding any suggestion that only "reasonable" certainty is required to convict. Even if California's instruction were deemed redundant, however, it could hardly be said to be unconstitutional for such a trivial reason. As this Court determined in *Hopt,* an instruction containing the "moral certainty" phrase, as well as others challenged by the defendant, might be "open to criticism" but could not have misled the jury in an unconstitutional way. 120 U.S. at 440-41.

McWilliams, 1993 Ala. LEXIS 316 at *29-32 (Mar. 19, 1993); *Stewart v. State,* 601 So. 2d 491, 505 (Ala. Crim. App. 1992); *Ellis v. State,* 356 S.W.2d 426, 429 (Ark. 1962); *People v. Jennings,* 807 P.2d 1009, 1041-42 (Cal. 1991); *Egantoff v. State,* 208 So. 2d 843, 845-846 (Fla. App. 1968); *Hicks v. State,* 425 S.E.2d 877, 878 (Ga. 1993); *Bradford v. State,* 412 S.E.2d 534, 536 (Ga. 1992); *State v. Bush,* 569 P.2d 349, 350-51 (Haw. 1977); *State v. Rhoades,* 822 P.2d 960, 979-80 (Idaho 1991) (adopting California's reasonable doubt instruction as the only appropriate one); *State v. Franklin,* 163 N.W.2d 437, 441 (Iowa 1968); *State v. Wilkins,* 523 P.2d 728, 735 (Kan. 1974); *Commonwealth v. Dinkins,* 615 N.E.2d 570, 575 (Mass. 1993); *People v. Turner,* 298 N.W.2d 848, 852 (Mich. App. 1980); *State v. Morley,* 474 N.W.2d 660, 669-70 (Neb. 1991); *Lee v. State,* 813 P.2d 1010, 1011 (Nev. 1991); *City of Minot v. Rubbelke,* 456 N.W.2d 511, 514-15 (N.D. 1990); *Commonwealth v. Banks,* 311 A.2d 576, 581 (Pa. 1973); *State v. Caruolo,* 524 A.2d 575, 583 (R.I. 1987); *State v. Brewer,* 197 N.W.2d 409, 411 (S.D. 1972); *Hardin v. State,* 355 S.W.2d 105, 108 (Tenn. 1962); *Marshall v. State,* 528 S.W.2d 823, 825 (Tenn. Crim. App. 1975); *see also People of Territory of Guam v. Yang,* 800 F.2d 945 (9th Cir. 1986) (territorial statute importing California's reasonable doubt instruction); *Rivett v. State,* 578 P.2d 946, 949-950 (Alaska 1978); *State v. Donovan,* 419 A.2d 1102, 1105-1106 (N.H. 1980); *State v. Wilkerson,* 291 A.2d 8, 11-12 (N.J. 1972); *People v. Rawlins,* 569 N.Y.S.2d 635, 638 (App. Div. 1991) (circumstantial evidence instruction); *Bowen v. State,* 715 P.2d 1093, 1097-1098 (Okla. Crim. App. 1984) (same); *State v.*

Flores, 566 P.2d 1281, 1282-1283 (Wash. App. 1977).[6]

Courts that criticize "moral certainty" language also recognize that the reference, notwithstanding its alleged deficiencies, does not diminish the prosecution's burden of proof and thus does not render the instruction unconstitutional. Among the cases petitioner cites in his brief on the "moral certainty" question, none invalidates a reasonable doubt instruction on constitutional grounds.[7] (Pet'r's Br. 20-21.) Moreover, to the extent

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6. Even in jurisdictions that for whatever reason no longer refer to "moral certainty" in their instructions, courts in the modern era have recognized the validity of the formulation or discerned in the phrase a special additional guarantee protective of the reasonable-doubt standard. *E.g., State v. Cage,* 554 So. 2d 39 (La. 1989) (reversed by this Court on other grounds, as argued above, in *Cage v. Louisiana*); *State v. Williams,* 828 P.2d 1006, 1018-21 (Or. 1992) (reference to "moral certainty" not invalid under *Cage,* and may convey the idea to the jury that absolute certainty is required or mitigate the impact of other wording that might have lessened the state's burden of proof); *State v. Seneff,* 435 N.E.2d 680, 684-685 (Ohio App. 1980).

7. In *Perez v. Irwin,* 963 F.2d 499 (2d Cir. 1992), "moral certainty" was used in an opposite way from its use in California. In *Perez,* the instructions equated "reasonable doubt" with "doubt to a moral certainty" rather than with proof to a moral certainty. *Id.* at 501. "By using the expression in this fashion the trial court placed the burden of the moral certainty requirement on the defendant rather than on the prosecution." *Id.* at 502. In *United States v. Del Toro Soto,* 676 F.2d 13, 17 (1st Cir. 1982), the federal court found no constitutional error in "moral certainty" language.

In *State v. Manning,* 409 S.E.2d 372, 374-75 (S.C. 1991), the court found the reference to "moral certainty" might allow the jurors to base a guilty verdict on subjective feeling rather than the evidence, but found the criticism insufficient to give rise to a constitutional violation. In *People v. Hewlett,* 519 N.Y.S.2d 555, 557 (App. Div. 1987), the instruction contained the glaring error of

petitioner's cited cases criticize "moral certainty" language at all, they do not do so on petitioner's unique theory that the phrase signals a diminution of the constitutional standard of proof.

Contrary to petitioner's position, criminal defendants often argue that it is the *omission* of the phrase "moral certainty" in a reasonable doubt instruction, rather than its inclusion, that renders the instruction erroneous. *E.g., People v. Palumbo,* 555 P.2d 521, 525 (Colo. 1976); *State v. Butler,* 543 A.2d 270, 278 (Conn. 1988); *People v. Simmons,* 95 N.E.2d 477, 481 (Ill. 1950); *Bieghler v. State,* 481 N.E.2d 78, 95 (Ind. 1985); *State v. Finnegan,* 237 N.W.2d 459, 460 (Iowa 1976); *Hockenbury v. Commonwealth,* 565 S.W.2d 448, 451 (Ky. 1978); *State v. Udstuen,* 345 N.W.2d 766, 768 (Minn. 1984); *State v. Schmeig,* 322 N.W.2d 759, 760 (Minn. 1982); *State v. Olkon,* 299 N.W.2d 89, 105 (Minn. 1980); *Allman v. State,* 571 So. 2d 244, 252 (Miss. 1990); *Watson v. State,*

defining the required degree of certainty not simply as moral certainty, but as a mere "reasonable degree of certainty."

Petitioner's citation to *Lanigan v. Maloney,* 853 F.2d 40, is obviously misplaced. The opinion in that case, if anything, applauded the "moral certainty" language and condemned instead the significant nullification of it -- "*a degree of* moral certainty -- reflected in the instructions in that case. *Id.* at 47 n.4. Also odd is petitioner's reliance upon *People of Territory of Guam v. Yang,* 800 F.2d 945 (9th Cir. 1986). There, the majority opinion allowed a departure from Guam's legislatively-mandated California-style instruction without expressing any opinion about the validity of the California instruction at all, *id.* at 947; and the dissenting opinion, quoted in petitioner's brief, took the position that it was the *departure* from the statutorily-adopted California-type instruction, not adherence to it, that amounted to error, *id.* at 950-51 (Ferguson, J., dissenting). Further, the dissent never indicated that the Ninth Circuit was "inclined" to reject the "moral certainty" language.

521 So. 2d 1290, 1295-1296 (Miss. 1988); *State v. Lane,* 244 A.2d 108, 109 (N.J. 1968); *State v. Watson,* 240 S.E.2d 440, 446 (N.C. 1978); *City of Minot v. Rubbelke,* 456 N.W.2d 511, 513 (N.D. 1990); *State v. Castrejon,* 856 P.2d 616, 618 (Or. 1993); *State v. Pratt,* 853 P.2d 827, 836 (Or. 1993); *State v. Bult,* 351 N.W.2d 731, 736-37 (S.D. 1984); *State v. Johnson,* 774 P.2d 1141, 1146 (Utah 1989) (defendant argued for reasonable doubt instruction virtually identical to that of California); *State v. Tanzymore,* 340 P.2d 178, 179 (Wash. 1959); *see also, Russell,* 971 F.2d at 1109; *State v. Harris,* 481 P.2d 504, 508 (Ariz. 1971); *Roberts v. State,* 620 P.2d 425 & n.1 (Okla. Crim. App. 1980); *Commonwealth v. Banks,* 311 A.2d 576, 581 (Pa. 1973); *State v. Bernal,* 330 N.W.2d 219, 220-221 (Wis. App. 1983). Defense manuals, also, in apparent recognition that "moral certainty" language protects the defense, suggest ways for trial lawyers to emphasize that language to the defendant's advantage.[8/]

8. For example, two well-known defense lawyers recommend that their colleagues at the defense bar argue to juries along these lines:

> "Reasonable doubt is a real doubt -- real as distinguished from imaginary -- which an honest juror will have after considering all the circumstances of the case. You as a juror, must be able to say, *'I am morally certain of the accused's guilt.'*
>
> *"Moral certainty, however, does not necessarily mean absolute certainty. In our daily affairs we constantly act on probabilities and we seldom act on moral certainty. But it is elementary that you can never convict simply because you think the accused is probably guilty. You must say that he is really guilty, and of that you are morally certain."*

F. Lee Bailey & Henry B. Rothblatt, *Successful Trial Techniques for Criminal Trials,* § 20:6 at 471 (2d ed. 1985) (emphasis added).

Another defense manual offers as a standard the jury argument

In fact, in this case, petitioner's trial counsel repeatedly made beneficial use of the very instructions petitioner now challenges in this appeal. The defense, arguably, manipulated the instruction to suggest that it imposed a burden of proof on the prosecution even higher than "beyond a reasonable doubt." Defense counsel repeatedly told the jurors to make a decision that not only satisfied their consciences, but one that they could live with for the rest of their lives.[9/] As

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of defense attorney Leonard Weinglass in a case called *People v. Skyhorse:*

> "That is the attitude you should have in the presumption of innocence. You would be of a mind set that resists this accusation, that has disbelief in it. That insists that proof, solid proof, quality proof be given you that would enable you to have *a moral conviction to an abiding certainty* of guilt.
>
> . . . .
>
> ". . . [I]f at the end of this case you have a suspicion of guilt or you think there's a possibility of guilt, or even a probability of guilt, under the law that the court will give you, you cannot vote for a guilty verdict unless you have *an abiding conviction to a moral certainty of guilt, which transcends and is much beyond the question of possibility, probability, a maybe, a perhaps, and speculation.*"

6 Abraham P. Ordover, *Criminal Law Advocacy, Argument to the Jury*, ¶ 5:08 at 5-99, 5-101 (1993) (emphasis added).

9. During the voir dire of the jury, the defense attorneys repeatedly discussed the prosecution's high burden of proof:

> If, for example, ... [y]ou just have a gut feeling that maybe he is involved. Maybe he did it, but you didn't hear something to really convince you *beyond a reasonable doubt and to a moral certainty.* Are you going to let that gut feeling or that intuition take over or will you require the rules of the court to be met?

(Rep.'s Tr. 2044; J.A. 29-30 (emphasis added).)

> Now when I ask that, in other words, there is a burden of proving a case beyond a reasonable doubt and to a *moral certainty* in each and every criminal case.

(Rep.'s Tr. 2047; J.A. 31 (emphasis added).)

> Now would you have any difficulty in requiring the prosecutor to meet the burden of proof as prescribed by law? In other words, to prove the truth of these charges beyond a reasonable doubt and to a *moral certainty*?

(Rep.'s Tr. 2056; J.A. 31 (emphasis added).)

> If, after he rested and we rested, you were not convinced beyond a reasonable doubt and to a *moral certainty in your heart*, would you be able to vote not guilty?

(Rep.'s Tr. 2057; J.A. 32 (emphasis added).)

> Now when we talk about the presumption of innocence, that's a legal presumption that everyone, including you and everyone else in this room has that you are legally presumed to be innocent until the contrary is proven beyond a reasonable doubt and to a *moral certainty.*

(Rep.'s Tr. 2207; J.A. 32-33 (emphasis added).)

Petitioner also emphasized the "moral certainty" language of the California reasonable doubt instruction during final argument:

> The prosecution has the burden of proof. And again, you have to look at this burden of proof and what is reasonable doubt. It's not a mere possible doubt. Anything can be possible. The moon could be made out of blue cheese, I guess. I guess not. We have been there. It cannot be.
>
> *What we're talking about is an abiding conviction to a moral certainty of the truth of the charge.* I am not sure what that means exactly. I guess that you kind of know it when you see it. Do I have a doubt? Is that doubt reasonable? That is the question you have to ask.

(Rep.'s Tr. 5385-86; J.A. 79 (emphasis added).)

> Do I have a doubt and is that doubt reasonable? Going down the line to each and every charge and each and every element of each and every charge. Do I have *an abiding conviction?* This is what you ask yourself.

noted by now-Chief Justice Rehnquist in his dissenting opinion in *Cool v. United States,* 409 U.S. 100, 107

> Reasonable doubt is the state of the case which after the entire comparison and consideration of all the evidence leaves your minds in the condition that *you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge. An abiding conviction, abide. To live with. Abode. Comes from the word "house." Abode. To live with. You live in your house.*
>
> Do I have *an abiding conviction to a moral certainty of the truth of the charges?* You have to think about when you go in, and do I have a doubt and is the [sic] reasonable, about what that means. Something that has to stay with you.
>
> If you go in and vote on a conviction, let's say second degree murder, manslaughter, the park charges October 14th and next week or next month or even next year, you think you have been thinking about it on and off. You say, you know, I really do have a doubt. The more I think about it, I have a doubt. Reasonable doubt. You know, I have doubts about this case. Well, then it hasn't lived with you. *The strength of your conviction to a moral certainty hasn't lived with you, an abiding conviction to a moral certainty. That's what the standard is.*

(Rep.'s Tr. 5392-93; J.A. 84 (emphasis added).)

> *If, after a consideration of all of the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal.*
>
> . . . .
>
> *Now something else that I think was touched upon by [defense attorney] Seymour that it's a decision when you say beyond a reasonable doubt and to a moral certainty. That means forever. That doesn't mean just today or the mood you are in today. That means a decision that you are going to live with forever. And it's probably, if not the most important decision you will ever make, certainly way up there on the list.*

(Rep.'s Tr. 5539; J.A. 85-86 (emphasis added).)

(1972), "If the nuance of the instruction upon which reversal is now based did not suggest itself to petitioner's trial counsel, it seems doubtful that it suggested itself to the jury either . . . ." Since petitioner's trial counsel in this case clearly recognized the pro-defendant benefit afforded by the "moral certainty" language in the California instruction, and used it to his advantage, it is doubtful any improper anti-defendant nuance suggested itself to the jury in this case.

b. Moral Evidence.

Petitioner next challenges the reference in CALJIC 2.90 to "moral evidence." (Pet'r's Br. 30-31.) This phrase, however, plays a relatively minor role in the California instruction, nowhere operating as any description or analogy for the concepts of reasonable doubt or proof beyond a reasonable doubt themselves.

As is invariably true, the context of the phrase shows how jurors likely understood it. Here, the instruction states: "Reasonable doubt is . . . not a mere possible doubt; *because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt.*" In CALJIC 2.90, then, it is immediately apparent that "moral evidence" does not purport to describe in any way the jury's possible degrees of certainty or uncertainty about the defendant's guilt or innocence at all. "Moral evidence" simply describes the kind of fallible evidence with which jurors are naturally confronted, and the sentence in which it appears merely states the virtual truism that proof of human events carries some inherent fallibility. *See Hopt v. Utah,* 120 U.S. at 441 ("the uncertainty that attends all human

evidence").[10/]

Petitioner nevertheless suggests that phrases like "moral evidence" are anachronisms without meaning to a modern jury. Even if this were true, it would not help petitioner make out his due process claim; for, if the phrase is meaningless, it could hardly be said that it is likely to diminish the true burden of proof. *See Holland,* 348 U.S. at 140; *Hopt,* 120 U.S. at 441. But petitioner's suggestion really is not true at all. The meaning of the phrase "moral evidence," anachronism or not, becomes readily discernable from its context in the very sentence in which it appears. That sentence almost self-consciously explains what it means by "moral evidence."

Petitioner also asserts that the references to "moral evidence," and perhaps to "moral certainty," somehow will be taken by the jurors as an invitation to find a defendant guilty because of their personal views of the morality of his conduct. (Pet'r's Br. 30-31.) First, however, petitioner again ignores totally the explanatory context in which these challenged phrases appear in CALJIC 2.90. As used in the instruction, the phrase merely denotes the potential fallibility of perception-limited and recollection-limited courtroom proof. It therefore does not call the jury's attention to any particular kind of "evidence" distinct in any way from the

10. This meaning is generally consistent with dictionary definitions. "Moral" has been defined, for example, as "[b]ased on a probability or on a general knowledge of human nature rather than on objective evidence or clear demonstration." *Standard College Dictionary* (Sidney I. Landau et al. eds., Funk & Wagnalls 1973). But, as with the challenged instructions in general, the best indicator of the meaning imparted to the jurors lies in the context of the language of the instruction. Here, the context makes the meaning discernable.

entirety of the evidence in the case.[11/]

Petitioner's complaint that "moral evidence" might be mistaken for "character evidence" is a non sequitur. First, the complaint is not germane to the Question Presented, which concerns the standard of proof, and not the admissibility or proper uses of character evidence. Second, even if it were interpreted to mean that, nothing in the way the term is employed in CALJIC 2.90 would suggest that character evidence was being specially recommended for the jury's consideration, for the instruction acknowledges the *limitations* of "moral evidence" instead. Third, where evidence bearing on a person's character is actually received in a criminal case -- either to show the defendant's character when it itself is a material issue or to show circumstantially some other material fact -- there is nothing wrong with the jury considering such evidence in arriving at a verdict.

Besides, other standard instructions reinforced the notion that the jurors were not to let their personal views of the morality of petitioner's conduct influence their verdict. The jurors were instructed that their duty was, instead, "to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict." CALJIC 1.00; J.A. 39. Those

11. Nor does "moral certainty" suggest any judgment of the defendant's morality rather than his factual guilt. The instruction does not relate to the defendant's conduct; instead, the phrase clearly employs "moral" as a description of the kind of certainty the juror must possess to convict. The California instruction requires the juror to have an abiding conviction to a moral certainty "*of the truth of the charge,*" based on the evidence. The instruction in its entirety therefore in no way implies, as petitioner indicates, that the jurors instead need be "certain" in any way of the "moral" nature of the defendant and his actions.

rules of law included the judge's instructions describing, not moral and religious factors, but the legal elements of the crimes charged against petitioner; and the instructions expressly required the jurors to find those elements to exist as a prerequisite to a guilty verdict. CALJIC 8.10; J.A. 50 ("In order to prove the commission of the crime of murder, each of the following elements must be proved . . . ."). Thus, when the entire corpus of the instructions is properly viewed as a whole, it cannot be said that it is reasonably likely that petitioner's jurors based their verdict on religious or moral beliefs rather than upon the factual evidence and the applicable law.

In sum: "moral evidence" plays a minor and non-controversial role in CALJIC 2.90; its meaning is self-explanatory from the context in which it appears; it does not threaten any misuse of character evidence; and, most important, its function in the instruction is extremely remote from describing the prosecution's burden of proof beyond a reasonable doubt. It is not "reasonably likely" that the jurors misunderstood the term in any way that would have lightened that burden of proof.

c. Not A Mere Possible Doubt.

Petitioner, last, attacks the following language from CALJIC 2.90 as further destructive of a proper understanding of the concept of proof beyond a reasonable doubt: "Reasonable doubt . . . is *not a mere possible doubt; because everything relating to human affairs,* and depending on moral evidence, *is open to some possible or imaginary doubt.*" (Pet'r's Br. 21-24.) He claims that it overstates the level of doubt that requires an acquittal to the point of requiring the jurors

to be satisfied that a defendant is probably innocent. Under this instruction, he says, "the jury is all too likely to understand the magnitude of a reasonable doubt necessary to acquit as the functional equivalent of 'an actual substantial doubt' or a 'grave uncertainty.'" (Pet'r's Br. 22, footnote omitted.)

At a threshold level, the challenged instruction's capacity to mislead on the question of proof beyond a reasonable doubt appears limited. The challenged language does not purport to describe, as a direct substitute or as an analogy or as a simile, either the standard of proof or reasonable doubt itself. It functions instead at a subordinate level: that of assisting in the statement of the obvious non-controversial truth that all things relating to human affairs and subject to retrospective courtroom proof are open to possible or imaginary doubt. The challenged language thus addresses itself primarily to a function different from stating the burden of proof.

At that level, moreover, the instruction functions correctly. By first distinguishing reasonable doubt from "mere possible" or "imaginary doubt," and also equating "mere possible doubt" with "imaginary doubt," the instruction in no way implies that a defendant's innocence must be probable in order to require acquittal. The instruction does not say that doubt based upon a possibility cannot be reasonable. Instead, it properly signals that not every imaginable, remote, and speculative doubt automatically constitutes reasonable doubt. *Lanigan v. Maloney,* 853 F.2d 40, 43 (1st Cir. 1988). Jurors, as far as respondent is aware, are not required by the Constitution to acquit every time the defendant offers a physically possible exculpatory version of the material facts -- *e.g.,* every time he offers an alibi or

every time the testimony of witnesses conflict. Instead, the jurors must determine if the possibility of innocence is such as to create in their minds a reasonable doubt of guilt.

Completely demonstrable or objective certainty is not required for proof beyond a reasonable doubt, and reasonable people may differ about whether reasonable doubt exists in a given case. *See Jackson v. Virginia,* 443 U.S. 307, 313, 326 (1979). The inability to adduce absolute proof in matters subject to courtroom evidence is the essence of the reasonable-doubt problem that confronts every jury. It is because of the insistence that jurors must be extraordinarily certain of guilt – notwithstanding the human inability to prove criminal guilt with mathematical certainty – that reasonable doubt instructions may speak of "certainty" short of mathematical certainty, or "certainty" in the face of merely unreasonable doubt, without being subject to criticism as internally inconsistent.

Petitioner's claim that the jury might equate the phrase "possible doubt" with an "actual substantial doubt" or a "grave uncertainty" is without merit. The jury in *Cage* was instructed that a reasonable doubt is not a mere possible doubt. 498 U.S. at 40. However, this Court did not find the "possible doubt" language in the *Cage* instruction problematic, and this Court certainly did not equate the "possible doubt" language with the terms "actual substantial doubt" and "grave uncertainty."

Further, the California instruction (1) ensures that, before returning a verdict of guilt, jurors must be convinced beyond a reasonable doubt, and (2) illustrates reasonable doubt as "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition

that they cannot say they feel *an abiding conviction, to a moral certainty, of the truth of the charge.*" It is not likely that, even if the "mere possible doubt" and "imaginary doubt" language were susceptible to the wooden interpretation petitioner constructs for it, the jurors in his case felt they had attained that high degree of conviction even though they actually doubted the defendant's guilt.[12]

* * *

Petitioner at the beginning of his brief calls CALJIC 2.90 a "jurisprudential dinosaur." (Pet'r's Br. 6.) It is not surprising, however, that petitioner would mischaracterize the instruction in that way: he is like the blindfolded man who cannot recognize an elephant when restricted to touching separately its trunk, its tusks, and its tail. Because he refuses to comprehend CALJIC 2.90 in its entirety, and in connection with surrounding instructions, he cannot reliably characterize it any way at

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12. Petitioner's reliance upon *State v. Chavarria*, 1993 Ariz. App. LEXIS 165 (Aug. 19, 1993) and *State v. Williams*, 828 P.2d 1006, 1019 (Or. 1992) is misplaced. Neither case supports petitioner's claim that the "possible doubt" language renders a reasonable doubt instruction constitutionally defective. Moreover, *Williams* specifically found the jury could not reasonably have construed the "possible doubt" language either to decrease the state's burden of proof or to allow the jury to base its decision on anything other than the evidence. *Williams*, 828 P.2d at 1019. And it is not clear that *Chavarria* is persuasive authority even in its own jurisdiction, for two other appellate panels in Arizona have declined to follow its critique of the Arizona instruction. *State v. Varela*, 1993 Ariz. App. LEXIS 226 at *20 (Oct. 5, 1993); *State v. Duzan*, 1993 Ariz. App. LEXIS 58 at *19 (Apr. 13, 1993).

all.

His attempt to show the instruction is unconstitutional, for that same reason, was doomed from the start. None of petitioner's criticisms of the three challenged phrases in CALJIC 2.90 makes sense when those phrases are considered in the explanatory context of the instruction. And none would make sense to jurors properly instructed, like the jurors in petitioner's case, to consider the instructions as a whole in the solemn context of a criminal trial. Petitioner has not carried his burden of demonstrating that – whatever deficiencies might inhere in the instruction – it is reasonably likely the jurors in his case actually misunderstood CALJIC 2.90 to allow a verdict of guilt based on anything less than their subjective certainty that the evidentiary proof established petitioner's guilt beyond a reasonable doubt. Instead, the instruction provides appropriate guidance emphasizing the high degree of certainty the Constitution requires to justify a criminal conviction. California's standard reasonable-doubt instruction, therefore, cannot be condemned as unconstitutional.

II. Any Invalidation of the California Instruction Should Apply Only Prospectively.

In California, CALJIC 2.90 is given to the jury in the exact wording of the pattern instruction in virtually every criminal case. *See People v. Brigham,* 599 P.2d 100, 104 (Cal. 1979) (warning that most instructions on reasonable doubt that "'step outside of well-established bounds'" are found to be erroneous). And, under California law, the instruction may be challenged on appeal even absent an objection at trial. Cal. Penal Code § 1259. In fact, all

six of California's Court of Appeal districts have issued orders deeming the issue in this case raised and rejected in all pending appeals. (Appendix.)[13] If a judgment is reversed, then California Penal Code section 1382 would require retrials within 60 days of the remittitur being issued on appeals from superior court judgments, and within 30 days on appeals from municipal court judgments.

If the California reasonable doubt instruction is found to violate due process in this case, it would be appropriate for this Court to determine if this ruling should be applied to this case and to other cases not yet final on appeal. *See Teague v. Lane,* 489 U.S. 288, 300 (1989) (plurality opinion) (Part IV (A)) ("In our view, 'the question whether a decision announcing a new rule should be given prospective or retroactive effect should be faced at the time of that decision'").

The current standard of retroactivity for non-final cases was established in *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987): "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all

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13. The Judicial Council of California's most recent Annual Report on Judicial Statistics discloses that 7,250 notices of appeal were filed in criminal cases from superior court judgments in fiscal year 1991-92. Judicial Council of California, 1993 Annual Report, Volume II, p. 25. This figure does not include appeals in juvenile delinquency cases or misdemeanor appeals resolved in the appellate department of state superior courts. The Report shows that a total of 154,617 superior court defendants had their criminal cases resolved in fiscal year 1991-92. *Id.,* p. 61. According to the Capital Case Coordinator of the California Attorney General's Office, there now are at least 214 non-final capital cases where the challenged instruction presumably was given.

cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."

The *Griffith* standard for non-final cases and the *Teague* standard for final cases are this Court's latest pronouncements on general standards for retroactive applications of new rules of criminal procedure. The federal Constitution itself neither prohibits nor requires retroactive application of a new rule, *see Griffith*, 479 U.S. at 320, and for some twenty years prior to *Griffith* and *Teague*, the three part analysis of *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967), controlled retroactivity issues in criminal cases. The *Linkletter/Stovall* standard applied to both non-final and final cases; retroactivity was determined on a case-by-case basis, depending on three factors: (1) the purpose to be served by the new rule; (2) the extent of reliance by law enforcement on the old rule; and (3) the effect on the administration of justice if retroactive application was allowed. *Stovall*, 388 U.S. at 300.

In 1982, a plurality of this Court concluded that the *Linkletter/Stovall* analysis should be "rethought" and adopted a new standard of retroactivity for Fourth Amendment cases. *United States v. Johnson*, 457 U.S. 537, 548 (1982). In 1987, a majority of this Court adopted the current *Griffith* standard for all non-final cases. 479 U.S. at 328.[14/]

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14. The *Griffith* rule has not received universal approval. One survey of retroactivity law concluded that *Griffith* is "too unbending" when considered in a remedial framework. The authors suggest a return to a *Linkletter/Stovall* analysis, to allow consideration of the unpredictability of the new rule; the nature and purposes of the rule; and the disruption of the administration of justice. Richard

Respondent realizes that *Griffith* was the product of this Court's long struggle to determine how to apply retroactivity principles. And respondent recognizes that, in adopting the *Griffith* rule, this Court intended to promote judicial integrity and ensure equal treatment of defendants in non-final cases by applying new decisions to all such cases. However, based on the unique circumstances of this case, respondent asks for an exception to *Griffith's* normal rule of retroactivity.[15/]

H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1731-1833 (1991).

15. An apparent exception to the *Griffith* rule has been created in Fourth Amendment exclusionary rule cases. Without mentioning *Griffith*, the majority opinion in *Illinois v. Krull*, 480 U.S. 340, 355 n.11 (1987), denied relief to the defendant even though, in his state court appeal, a state statute authorizing warrantless administrative searches was found to be unconstitutional. Recognizing the difference between the substantive Fourth Amendment right and the remedy of suppression, *see Krull*, 480 U.S. at 368 (O'Connor, J., dissenting), this Court's analysis nevertheless invoked considerations reminiscent of the *Linkletter/Stovall* standard -- *i.e.*, the deterrent purpose to be served by the new standards and the extent of reasonable reliance by law enforcement authorities on the old standards. Prior to *Johnson* and *Griffith*, exclusionary rule cases such as *Krull* were analyzed using the *Linkletter/Stovall* factors, with the distinction between remedy and constitutional right factored in the "purpose of the rule." *See United States v. Peltier*, 422 U.S. 531, 538 (1975) (discussing the focus of retroactivity cases on purposes served by the exclusionary rule). The effect of *Krull* was to deny the defendant, and others who suffered from the state's reasonable reliance on the unconstitutional statute, any benefit from the new rule, even if their convictions were not final when it was announced. *Krull's* apparent departure from *Griffith* is remarkable since *Johnson*, a pre-*Griffith* case, rejected the *Linkletter/Stovall* standard and held that, for Fourth Amendment cases, new decisons would be applicable to all non-final cases subject to the "clear break"

Any decision invalidating CALJIC 2.90 should apply only to defendants whose juries are instructed after the decision is announced, *see generally Krull,* 480 U.S. at 342-361; *Morrissey v. Brewer,* 408 U.S. 471, 490 (1972), or, at the most, only to petitioner and such defendants, *see Stovall,* 388 U.S. at 301.

Most important, if CALJIC 2.90 is unconstitutional, the error would exist in virtually every California case, for the identical instruction is expected to be given in every case. Application of *Griffith* and *Sullivan* would overturn every criminal conviction in thousands of non-final cases. The catastrophic effect on California's criminal justice system itself justifies an exception to *Griffith's* normal rule of retroactivity.

Further, petitioner concedes that at least until the mid-nineteenth century, reasonable doubt was correctly explained by using the terms "moral evidence" and "moral certainty." (Pet'r's Br. 5, 34.) Petitioner claims that this correct usage became incorrect at some unspecified time because the meaning of those phrases "changed dramatically during the past 150 years . . . ." *Id.* at 5; *see also id.* at 37. Therefore, if this Court condemns California's use of those phrases today based upon such gradual evolution of language usage, it would be impossible to determine exactly when the phrases somehow evolved from accurately describing reasonable doubt into unconstitutionally altering the burden of proof. Prospective application would not offend *Griffith's* concerns of judicial integrity and equal treatment of

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exception. *See Krull*, 480 U.S. at 368 (O'Connor, J., dissenting) (finding the Court's ruling "at right angles, if not directly at odds" with *Griffith*).

similarly situated defendants, for it is impossible to determine which defendants, petitioner included, actually suffered from constitutional error. In other words, in terms like those used by this Court in *Sullivan v. Louisiana,* it cannot be ascertained with confidence which defendants over time actually have suffered a "vitiation" of "all the jury's findings." 113 S.Ct. at 2082. Any invalidation of CALJIC 2.90 should apply only to defendants whose juries are instructed after the decision or, at most, only to petitioner and such defendants.

Another consideration favoring an exception to the *Griffith* rule is the historical development of this instructional issue. Although this Court has declared the reasonable doubt standard itself to be a necessary component of due process, it has allowed widely divergent views to develop among the states and federal circuits as to what and whether clarifying, explanatory or defining instructions might be given on the concept, without providing clear guidance toward achieving one consistent position. California's response was a statute on reasonable doubt and a related pattern jury instruction. California's instruction has been operative for decades with no indication by this Court that it was constitutionally infirm, even though other jurisdictions treated the issue differently. The state made a reasoned, good faith attempt to explain a concept that, so far, has resisted a single universally accepted definition and ultimately might be found to support more than one constitutionally acceptable definition. This is an especially compelling case because, by petitioner's own concession, the challenged phrases correctly defined reasonable doubt in the past.

Moreover, if the challenged California instruction is found unconstitutional, the question would remain as to

what language should be substituted to cure the infirmity. In view of the nationwide divergence on the propriety of such an instruction, a ruling that finds the instruction unconstitutional would not solve the state's problem in determining what instruction would pass constitutional muster. In the absence of clear guidance from this Court on what kind of clarifying language would survive constitutional challenge, California would be left to attempt yet another explanation of reasonable doubt. While it may be appropriate for this Court "to allow the various States to serve as laboratories in which the issue receives further study," *Teague*, 489 U.S. at 296, it would be extremely unfair to exact from the state the tremendous penalty of automatic reversals now and at the same time force the state to assume the same risk as it faces the problem of how to craft an appropriate reasonable doubt instruction for future cases. A narrow exception to *Griffith* is therefore justified in this unique situation.

Prospective application of this decision would not be unduly unfair to California defendants with non-final convictions, because the California instruction correctly and expressly stated the general proposition that guilt had to be established by proof beyond a reasonable doubt. The challenged "moral certainty" language has been used by California defendants, including petitioner, to suggest an increase, not decrease, of the prosecution's burden, as discussed above. The petitioner's lack of objection at trial to the California instruction, coupled with authorities previously cited which approved of the challenged California instruction, strongly indicate that the alleged infirmity was not so serious as to require, as

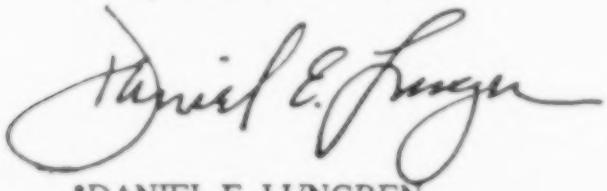
a matter of fundamental fairness, that all defendants with non-final convictions receive the benefit of automatic reversal under this decision.

Finally, respondent recognizes that retroactive application serves a purpose in overcoming an aspect of a criminal trial which "'substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials,' . . . ." *United States v. Peltier,* 422 U.S. at 535 (quoting *Williams v. United States,* 401 U.S. 646, 653 (1971)). However, the likelihood of an accurate conviction in this case and in past cases was not seriously diminished by the allegedly erroneous instruction. Defense attorneys in California have used the alleged infirmity in the "moral certainty" language in a manner that helps, not hurts, their clients, as previously demonstrated by citations to petitioner's jury voir dire and jury argument and by reference to defense manuals. A California jury in a criminal case consists of twelve members who are required to reach a unanimous verdict, although the federal Constitution does not require either that many jurors or unanimity. *See Apodaca v. Oregon,* 406 U.S. 404 (1972); *Williams v. Florida,* 399 U.S. 78 (1970). Considering these circumstances, the accuracy of guilty verdicts in this and past California trials, even given the allegedly erroneous instruction, is not so impugned as to demand retrospective application of this decision.

CONCLUSION

CALJIC 2.90, both on its own and in combination with other standard instructions, provided proper guidance to petitioner's jury on the issue of reasonable doubt. It is constitutional, moreover, for it is not reasonably likely that the jury interpreted it in derogation of the proper standard of proof. Last, any holding that CALJIC 2.90 is unconstitutional should be applied prospectively only. The California Supreme Court's judgment, upholding the conviction and death sentence, should be affirmed.

Respectfully submitted,



*DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
SUSAN LEE FRIERSON
Deputy Attorney General
SHARLENE A. HONNAKA
Deputy Attorney General
DONALD E. DE NICOLA
Deputy Attorney General
SHARON WOODEN RICHARD
Deputy Attorney General
Attorneys for Respondent
*Counsel of Record

APPENDIX

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

MISC. ORDER 93-1

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal pending before this court and not yet final from a judgment following a jury verdict, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 based on Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (Dock. No. 92-9049), and this court shall be deemed to have rejected that challenge on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 457; People v. Sandoval (1992) 4 Cal.4th 155, 186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234; People v. Jennings (1991) 53 Cal.3d 334, 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in Sandoval v. California without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Dated NOV 01 1993

/s/
Carl W. Anderson
Administrative Presiding Justice

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

SECOND APPELLATE DISTRICT

MISCELLANEOUS ORDER 11-9-93

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal pending before this court from a judgment following a jury verdict and not yet final, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 (4th ed. 1979) as in Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (62 U.S.L. Week 3241, Dock. No. 92-9049).

In every such case, this court shall be deemed to have rejected appellant's challenge to CALJIC No. 2.90 on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 457; People v. Sandoval (1992) 4 Cal.4th 155, 186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234; People v. Jennings (1991) 53 Cal.3d 334, pp. 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in Sandoval v. California, supra, without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Dated: November 9, 1993.

/s/
LILLIE, A.P.J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

MISC. ORDER 93-1

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal from a judgment after jury verdict pending before this court and not yet final, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 (4th ed. 1979) based on *Sandoval* v. *California*, certiorari granted September 28, 1993, ___ U.S. ___ (62 U.S.L. Week 3241, 3259, Dock. No. 92-9049); and the Attorney General shall be deemed to have argued that this court must reject appellant's challenge to CALJIC No. 2.90 for the following reasons: (1) the decisions in *People* v. *Jennings* (1991) 53 Cal. 3d 334 and *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450; (2) the critical difference in wording between CALJIC No. 2.90 and the Louisiana instruction implicated in *Cage* v. *Louisiana* (1990) 498 U.S. 39; and (3) the absence of any reasonable likelihood that a jury would apply the CALJIC No. 2.90 instruction in a way that would violate the federal Constitution (*Boyde* v. *California* (1990) 494 U.S. 370); and this court shall be deemed to have rejected the challenge on the ground that it is bound by the California Supreme Court's resolution of the issue (*Auto Equity Sales, Inc.* v. *Superior Court*, *supra*, 57 Cal.2d at p. 455; *People* v. *Sims* (1993)

5 Cal.4th 405, 457; *People* v. *Noguera* (1992) 4 Cal.4th 599, 633-634; *People* v. *Sandoval* (1992) 4 Cal.4th 155, 186; *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1234; *People* v. *Jennings*, *supra*, 53 Cal.3d at 385-386).

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in *Sandoval* v. *California* without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Dated: 11/5/93

/s/ Puglia
Presiding Justice

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

MISC. ORDER 11-04-93

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal pending before this court from a judgment following a jury verdict and not yet final as to this court and in which appellant's opening brief is on file on the date of this order, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 (4th ed. 1979) as in Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (62 U.S.L. Week 3241, Dock. No. 92-9049). Unless the opinion deals expressly with the issue, this court's opinion in any such case shall be deemed to reject that challenge on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 456-457; People v. Sandoval (1992) 4 Cal.4th 155, 185-186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234-1235; People v. Jennings (1991) 53 Cal.3d 334, 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review in the cases described after rendition of the decision in Sandoval v. California without the need for appellants in those cases to raise the issue in supplemental pleadings or petitions on an individual basis. The order is without prejudice to any appellant's arguing the court is not bound by Auto Equity Sales, Inc. v. Superior Court, supra, 57 Cal.2d 450.

/s/
KREMER, P.J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FOURTH APPELLATE DISTRICT, DIVISION TWO
MISCELLANEOUS ORDER 93-1

THE COURT:

IT IS HEREBY ORDERED that in criminal cases not yet final wherein the defendant has been found guilty by a trier of fact, this Court deems that all appealing defendants have raised the argument that the definition of reasonable doubt, as set forth in CALJIC No. 2.90, is unconstitutional. This Court further deems that the Attorney General has opposed this argument on the ground that the Court is bound to follow prior state Supreme Court decisions upholding the constitutional validity of the instruction under principles of stare decisis.

In those criminal proceedings wherein the defendant has been found guilty by a trier of fact, this Court will incorporate, in all opinions and orders denying a petition for rehearing issued after the date of this order, reference to this argument having been deemed raised and opposed in addition to its determination that it is bound, under Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, to follow prior state Supreme Court decisions upholding the constitutional validity of the definition of reasonable doubt as set forth in CALJIC No. 2.90.

Based upon the above, until further notice or order of this Court, parties are not required to raise this issue in opening, reply, or supplemental briefs or petitions for rehearing in order to preserve it on the merits.

Prior to the filing of this order, this Court has denied appellants' requests in a number of appeals for permission to serve and file supplemental briefs raising this argument in cases where no opinion has been filed. This miscellaneous order also applies to all of those cases, and, therefore, all of those requests are DEEMED to have been reconsidered, and all orders denying those requests are hereby VACATED. Pursuant to this order, this Court will incorporate the above-described reference in the opinion in each of these cases. The clerk of this court is DIRECTED to place a copy of this miscellaneous order in the miscellaneous documents file of each of these appeals and mail copies to counsel of record.

The purpose of this order is to ensure that this issue will be preserved for review in the cases described after rendition of the decision in People v. Sandoval (1992) 4 Cal.4th 155, certiorari granted September 28, 1993, without the need for appellants in those cases to raise the issue on an individual basis. The order is without prejudice to any appellant's arguing the Court is not bound by Auto Equity Sales, Inc. v. Superior Court, supra.

/s/ Ramirez
P. J.

COURT OF APPEAL ---- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Respondent	G013849
vs.	Orange County No. C-94705
Appellant	

Defendant's request to file a supplemental brief challenging the constitutionality of CALJIC No. 2.90 is granted. The proposed supplemental brief is deemed filed this date. The Attorney General may file a response if he wishes within 15 days of the filing of this order, but is not required to do so. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455; see People v. Jennings (1991) 53 Cal.3d 334, 385; People v. Smith (1992) 9 Cal.App.4th 196, 202.)

Presiding Justice

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

MISCELLANEOUS ORDER NO. 93-01

THE COURT:

IT IS HEREBY ORDERED that in every criminal appeal pending before this court from a judgment following a jury verdict where the disposition is not yet final, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 based on Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (Dock. No. 92-9049).

It shall also be deemed in every such case that the Attorney General argues that this court must reject the appellant's challenge to CALJIC No. 2.90 because of: (1) the decisions in People v. Jennings (1991) 53 Cal. 3d 334 and Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450; (2) the critical difference in wording between CALJIC No. 2.90 and the Louisiana instruction implicated in Cage v. Louisiana (1990) 498 U.S. 39; and (3) the absence of any reasonable likelihood that a jury would apply the CALJIC No. 2.90 instruction in a way that would violate the federal constitution. (Boyle *[sic]* v. California (1990) 494 U.S. 370.)

In every such case, this court shall be deemed to have rejected appellant's challenge to CALJIC No. 2.90 on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court, supra, 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 457; People v. Sandoval (1992) 4 Cal.4th 155, 186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234; People v. Jennings, supra, 53 Cal.3d at pp. 334, 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in Sandoval v. California, supra, without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Dated: November 4, 1993.

/s/_____

BEST, P.J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MISC. ORDER 93-1

BY THE COURT

IT IS HEREBY ORDERED that in every criminal appeal pending before this court and not yet final from a judgment following a jury verdict, appellant shall be deemed to have challenged the constitutionality of CALJIC No. 2.90 based on Sandoval v. California, certiorari granted September 28, 1993, ___ U.S. ___ (Dock. No. 92-9049), and this court shall be deemed on the date of the filing of the opinion to have rejected that challenge on the ground that, pursuant to Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, the court is bound by the California Supreme Court's resolution of the issue. (People v. Sims (1993) 5 Cal.4th 405, 457; People v. Sandoval (1992) 4 Cal.4th 155, 186; People v. Noguera (1992) 4 Cal.4th 599, 633-634; People v. Johnson (1992) 3 Cal.4th 1183, 1234; People v. Jennings (1991) 53 Cal.3d 334, 385-386.)

The purpose of this order is to ensure that this issue will be preserved for review after rendition of the decision in Sandoval v. California without the need for appellants in pending appeals to raise the issue in opening, reply or supplemental briefs or in petitions for rehearing on an individual basis.

Any prior orders of this court to the contrary in individual cases are vacated and superseded by this order.

Dated: NOV. 5, 1993

_____P.J.